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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY TERRADO,

Defendant and Appellant.

D074330

(Super. Ct. No. SCD277057)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed.

Britton Donaldson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kristine A. Gutierrez and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Terrado pled guilty to first degree residential burglary, and admitted an enhancement alleging that a nonaccomplice was present during the burglary. (Pen. Code,

§§ 459, 460, subd. (a); 667.5, subd. (c)(21).) The court ordered Terrado to serve 365 days in local custody (with a provision that he could be released to a residential treatment program after serving 130 days) and imposed four years' formal probation with numerous conditions. Terrado's sole appellate contention is that the court erred in including electronic devices in his Fourth Amendment waiver probation condition.<sup>1</sup> We reject this contention and affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

In January 2018, Terrado entered a residential unit (a garage that had been converted into a bedroom) when the female resident was at home. The resident ran outside and called the police. When the owner of the main residence returned home, he noticed the door leading into his kitchen was open. The owner found items that did not belong to him, including screwdrivers and clothing. The owner noticed two beer cans had been removed from the refrigerator, one of which had been partially consumed. He was missing \$50 in cash and \$200 worth of coins.

Based on these facts, Terrado pled guilty to burglary and admitted he "entered a residential building with the intent to commit a theft while [the building] was occupied by another person other than an accomplice." The parties stipulated to "NOLT" (no opposition to local time). On the plea form, Terrado initialed the clause entitled "Appeal

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<sup>1</sup> Many cases are pending on this issue in the California Supreme Court. (See, e.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650 (*Trujillo*).)

Rights," which stated that he waived his right "to appeal the following: 1) denial of my 1538.5 motion, 2) issues related to strike priors . . . , and 3) any sentence stipulated herein."

The probation report showed that at the time of sentencing Terrado was 25 years old, was unemployed and homeless, and had five children (ages 3 to 9) with two former girlfriends. Terrado had a long history of drug and alcohol abuse, and was using methamphetamine three times a day and drinking alcohol every day. When speaking with the probation officer, he denied having a drug problem.

Terrado also had a juvenile criminal history, involving battery on a significant other, damaging property, possessing a switchblade, and cocaine use. He had a battery conviction as an adult, and had violated probation on numerous occasions. He also committed a theft crime the day after the current offense. He told the probation officer he was " 'sorry for what I've done' " and he was " 'trying to fly straight.' " The probation officer opined that Terrado has a "serious drug problem" and had been participating in theft crimes "for some time as a means to support his methamphetamine use."

The probation officer recommended 365 days of local custody and three years of formal probation with numerous conditions, including a Fourth Amendment waiver to "aid[] in his rehabilitation" and to "appropriately supervise the defendant." The proposed Fourth Amendment waiver condition included a requirement that he "[s]ubmit . . . [a]ll electronic devices to search at any time with or without a warrant, and with or without reasonable cause, when required by [his probation officer] or law enforcement officer."

At the sentencing hearing, defense counsel asked the court to consider releasing Terrado to a residential drug rehabilitation program, stating: "He does now acknowledge he does have a drug problem. His [parents are] here in court today. . . . They support that." He objected to several probation conditions, including the electronics-search condition, asserting the Fourth Amendment search waiver should not be extended to "computers and recordable media" because "[t]his case involved Mr. Terrado going into a house and taking some cash and coins. It does not involve the use of any electronic devices. I don't believe there is a nexus either here or based on his prior record."

Before addressing this specific objection, the court stated: "[T]he concern that I have with Mr. Terrado . . . [he] has five kids, and he's 25 years old. He does not pay child support for a single one because he's unemployed . . . . What he seems to do in his spare time is either use drugs or get himself into trouble. So . . . my concern is . . . how is he going to keep himself occupied once he gets out of custody?" Defense counsel replied: "[S]ince this probation interview, [Terrado] has had somewhat of a change of mindset. [¶] The mother of his children has told him that she would not want him to be a part of their lives unless he completes residential [drug] treatment. He is really motivated now because he does want to be back in their lives. It's new incentive for him to commit to sobriety."

The prosecutor responded: "[T]he People's position is Probation's [recommendation] of 365 [in local custody] is very reasonable. [T]his [crime] . . . teeters on a prison case. [¶] And if the Court is going to allow some kind of release to a

treatment program, I would ask that there still be a significant amount of custody before that release, given the seriousness of the [crime] . . . ."

After considering these arguments, the court imposed four years' formal probation, with Terrado serving 365 days in local custody and a provision he can be released to a residential drug program after serving 120 days. The court also agreed with the probation department's recommendation that the Fourth Amendment waiver should "extend to all electronic devices." In explaining its reasoning on this probation condition, the court stated:

"The defendant started using marijuana when he was 13 years old. He then escalated to other drugs, including intravenous methamphetamine up to three times a day. [¶] He is only now willing to admit that he has [a] drug problem, despite the fact that it has motivated his criminality for a significant period of time. And in fact, forced him to be homeless because the family got burnt out on his drug use.

"In any event, in addition to this case, he has another pending burglary case, a [Vehicle Code section] 10851, so the theft seems to support his drug habit. And because phones and other electronic media are used to get drugs and gain access to people with drugs, the Court does think it's appropriate to extend the [F]ourth waiver to all electronic devices.

"Furthermore, [the probation department] should have that as a resource to further monitor him, given his young age and the fact that he has had his last chance at probation this time."

After identifying several other probation conditions, including the prohibitions against drug and alcohol use and requiring drug and alcohol testing and a drug treatment program, the court said "Mr. Terrado, do you accept probation on those terms and conditions?" Terrado responded: "Yes, your Honor." The court then reminded Terrado

he will be required to participate in a residential treatment program and noted: "What's important about this, Mr. Terrado, and your understanding this, if it's true that you want to have a relationship with any of your five children at this point, is that this is your last chance at probation. And if you go to prison, it's state prison. It's not local. So you have to be committed to your sobriety. And if you're not, you're going to come right back to where you are right now, sir." Terrado responded: "Yes, ma'am. I understand."

## DISCUSSION

Terrado contends the court erred in imposing the electronics-search probation condition because it is not reasonably related to his future criminality and it is unconstitutionally overbroad.

### *I. Certificate of Probable Cause*

The Attorney General initially urges us to dismiss the appeal because Terrado did not obtain a certificate of probable cause. (See Pen. Code, § 1237.5.) In his plea agreement, Terrado agreed he would be "given . . . [probation] conditions deemed reasonable by the Court" and agreed to waive his right to appeal "any sentence stipulated herein." In arguing a probable cause certificate is necessary, the Attorney General relies on *People v. Espinoza* (2018) 22 Cal.App.5th 794 (*Espinoza*), which interpreted a plea agreement containing different language.

In *People v. Patton* (2019) \_\_ Cal.App.5th \_\_ [2019 Cal.App. LEXIS 676], this court recently held the defendant was not required to obtain a certificate of probable cause to challenge an electronics-search probation condition after agreeing to plead guilty in a form identical to the one signed by Terrado. We reasoned the appellate challenge

fell outside the scope of the plea agreement and concerned events occurring after the plea, and therefore came within the exception in California Rules of Court, rule 8.304(b)(4)(B). We distinguished *Espinoza* based on the broader language in the *Espinoza* defendant's appellate waiver.

The facts before us are indistinguishable from *Patton*. We thus conclude Terrado's electronics-search probation condition challenge is properly before us.

## II. Reasonableness Under Lent Standard

### A. Legal Principles

Probation is not a right, but an act of leniency allowing a defendant to avoid imprisonment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) When imposing probation, "courts have broad discretion to impose [probation] conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).)

This broad discretion "is not without limits." (*Carbajal, supra*, 10 Cal.4th at p. 1121.) A probation condition "must serve a purpose specified in the statute," and conditions regulating noncriminal conduct must be " 'reasonably related to the crime of which the defendant was convicted or to future criminality.' " (*Ibid.*) In *Lent*, the California Supreme Court held a probation condition is "invalid" under this standard *only* if the condition " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) "This test is conjunctive—all three prongs must be

satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) We apply an abuse of discretion standard in reviewing the trial court's application of this test. (*Ibid.*)

### B. *Analysis*

The parties agree the electronics-search condition has no relationship to the crime to which Terrado pled guilty, and the condition relates to conduct that is not criminal. Therefore, the issue is whether the condition is "reasonably related to future criminality" (the third *Lent* factor). (*Lent, supra*, 15 Cal.3d at p. 486.)

The factual record supports that the electronics-search condition is reasonably related to Terrado's future criminality. First, the probation condition is related to preventing Terrado from continuing to commit similar property crimes. The court made a specific finding that Terrado likely committed the burglary to obtain funds to support his illegal drug use and that electronic devices are typically used for drug transactions. This was a reasonable conclusion supported by evidence in the record, including Terrado's lengthy history of serious drug abuse, the nature of his continued criminal conduct (he had committed another property offense near the time of the current offense), and the fact that he was unemployed and homeless when he burglarized the residence. Because monitoring Terrado's electronic devices to detect and deter drug transactions can prevent his future commission of property crimes, the court had a reasonable basis to impose the electronics-search waiver condition.

On appeal, Terrado does not challenge the existence of a factual nexus between his property crimes, his use of drugs, and his likely future use of electronic devices to



facilitate his drug use. He instead focuses on a legal argument that a supervision rationale alone is insufficient to justify an electronics-search waiver. In asserting this argument, he asks this court to reconsider our decision in *Trujillo*, *supra*, 15 Cal.App.5th 574, which is pending at the California Supreme Court. Because the facts here are materially distinguishable from *Trujillo*, we need not reach this argument. The trial court here made specific findings, supported by facts in the record, that Terrado's use of electronic devices was likely connected with the burglary crime and monitoring the devices would reduce the possibility he would commit additional property crimes.

In any event, until the high court instructs otherwise, we adhere to our reasoning and conclusion in *Trujillo*. As explained in *Trujillo*, after *Lent*, the California Supreme Court clarified that a probation condition "that enables a probation officer to supervise his or her charges effectively *is . . . 'reasonably related to future criminality.'*" (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381, italics added; accord, *In re P.O.* (2016) 246 Cal.App.4th 288, 295 (*P.O.*)). Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. (*Olguin*, at pp. 380-381; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67.) "This is true 'even if [the] condition . . . has no relationship to the crime of which a defendant was convicted.'" (*P.O.*, at p. 295, quoting *Olguin*, at p. 380.)

The record shows Terrado has substantial risk factors relevant to reoffending, including significant untreated methamphetamine abuse, lack of stable housing, a lengthy

criminal history, and repeated failures while on probation. The court imposed the electronics-search condition with the stated awareness of these facts and the probation department's conclusion that Terrado would require close supervision to support a successful probation, and that this monitoring should include access to Terrado's electronic devices and activities. Under *Lent*, the court acted within its discretionary authority in doing so.<sup>2</sup>

### III. *Constitutional Challenge*

Terrado alternatively contends the electronics-search condition is unconstitutionally overbroad.

A probation condition is unconstitutionally overbroad if it is not closely or narrowly tailored and reasonably related to the compelling state interest in reformation and rehabilitation. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

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<sup>2</sup> In urging us to revisit *Trujillo*, Terrado relies on a Sixth District Court of Appeal decision that is also pending at the high court, *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937. *Bryant* is unpersuasive on this issue because it did not separately analyze the third *Lent* factor, and instead merged the issue with constitutional overbreadth analysis. Further, to the extent *Bryant* reached a different conclusion on the third *Lent* factor, we decline to follow it.

Generally, an appellant forfeits a constitutional overbreadth claim by failing to raise it in the court below. (See *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033; see *Sheena K.*, *supra*, 40 Cal.4th at p. 885; *People v. Welch* (1993) 5 Cal.4th 228, 237.) An exception applies if the defendant asserts a facial challenge presenting a pure question of law capable of resolution " ' ' "without reference to the particular sentencing record developed in the trial court." ' ' " (*Sheena K.*, at pp. 884, 886, 887-889.)

Under these principles, Terrado forfeited an as-applied constitutional challenge because he did not assert the issue in the trial court. Recognizing this, Terrado mounts solely a facial challenge to the constitutionality of the electronics-search condition. He relies primarily on *Riley v. California* (2014) 573 U.S. 373 (*Riley*).)

In *Riley*, the United States Supreme Court rejected the government's argument that law enforcement may, without a warrant, search a cell phone seized from an arrested individual. (*Riley, supra*, 573 U.S. at pp. 386-387.) In reaching this conclusion, the court discussed the fact that a modern cell phone can hold an immense amount of confidential information, including past and current medical records, past and current financial records, Internet searches involving highly personal issues, personal diaries, photographs, and intimate correspondence. (*Id.* at pp. 393-398.) The court balanced the strong privacy intrusion arising from a search of this type of information against the law enforcement justifications for dispensing with the warrant requirement, and found the arrestee's privacy concerns outweighed the law enforcement justifications. (*Id.* at pp. 387-401.) But the court made clear it was not holding "a cell phone is immune from search," and

recognized its ruling would not necessarily extend to other situations in which law enforcement needs are stronger. (*Id.* at pp. 401-403.)

As this court has held, *Riley* does not support a conclusion that an electronics-search waiver condition is facially unconstitutional. (See *Trujillo*, *supra*, 15 Cal.App.5th at pp. 587-589, rev. gr.; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1128-1130, review granted Dec. 14, 2016, S238210.) Although we agree with *Riley*'s description of the serious privacy concerns pertaining to cell phone searches, *Riley*'s ultimate conclusion regarding the need for a warrant to search an arrestee's phone does not necessarily apply in the probation condition context without specific facts showing a heightened privacy interest. (*Trujillo*, at pp. 587-589; *Nachbar*, at p. 1129; accord, *In re J.E.* (2016) 1 Cal.App.5th 795, 803-807, review granted Oct. 12, 2016, S236628.) An arrestee who has not been charged or convicted stands in a different position than a convicted felon with respect to privacy rights. (See *Trujillo*, at pp. 586-589; *Nachbar*, at pp. 1128-1129.) Moreover, the governmental interests are different in the probation context. In this case, the facts support the need for intensive probation supervision to promote rehabilitation and ensure public safety, and Terrado made no showing an electronics search would be materially different from a search of his residence, a condition to which he has not objected.

While *Nachbar* and *Trujillo* remain pending before the California Supreme Court, we continue to find their reasoning persuasive, absent a contrary direction from the high court. (See Cal. Rules of Court, rule 8.1115(e).) Because the electronics-search condition is not constitutionally overbroad in every case, Terrado's facial challenge is

unavailing. To sustain a facial challenge, Terrado could prevail only if he establishes no set of circumstances exist under which the condition would be valid. (See *United States v. Salerno* (1987) 481 U.S. 739, 745.) He has not done so in this case.

DISPOSITION

Judgment affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.